Is the ICC’s Exclusively African Case Docket a Legitimate and Appropriate Intervention or an Unfair Targeting of Africans?

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Summary

The International Criminal Court (ICC) continues to face increasing criticisms about its purely African case docket since all eight of its active investigations (situations) and all eighteen prosecutions (cases) are against Africans. The Court’s expanding global reach and the Office of the Prosecutor’s (OTP) overall prosecutorial strategy in selecting situations and cases have raised concerns about the legitimacy of the ICC and its ability to dispense indiscriminate justice for crimes under its jurisdiction. The ICC’s focus on Africa has prompted many within and beyond Africa to ask why it is only Africans facing international justice in The Hague when crimes are widespread in other parts of the world.

Some have gone so far as to accuse the Court of being a neo-colonialist institution peddling a Western agenda that seeks to control African politics through ICC investigations and prosecutions. This perception of the Court held by some Africans and non-Africans alike as well as some individuals in countries where the ICC is operating should not be ignored. There is need for a stronger complementarity agenda and more substantive engagement with African leaders, civil society, and victims if the Court is to be successful and effective in administering justice in Africa. Supporters of the Court, who include most victims, see it as the only avenue to hold certain military and political leaders accountable. They know all too well that without the ICC impunity will prevail for state-sponsored and other mass crimes.

This author takes the view that the ICC’s focus on Africa is both necessary and appropriate. Assessing the legitimacy and fairness of the ICC’s intervention in Africa requires a more detailed analysis that goes beyond the geographical make-up of its case docket. Ideally—and Africa should further this pursuit—African victims should have recourse to justice and accountability in African courts that are easily accessible to them. Indeed this is the best approach to curtail the ICC’s intervention. We must not forget that ICC intervention signals first and foremost a failure of states, which have

the primary responsibility fairly and impartially to investigate and prosecute crimes within their jurisdiction.

This chapter seeks to contribute to the debate by focusing on whether the Situations and Cases before the Court, despite being African in character, are justified from a legal standpoint. However this approach does not detract from legitimate calls for the OTP, as the triggering force of ICC jurisdiction, to do more in other regions under its authority where international crimes have been committed. Victims everywhere deserve some form of national or international justice. There are many reasons in favor of the ICC’s involvement in African Situations; from the nature of the crimes and widespread systematic conflicts on the continent to a lack of capacity or willingness to hold perpetrators accountable, thereby providing redress to victims. The Court’s delicate relationship with Africa highlights its role in ongoing conflicts and the ever present power politics between Africa and the West through referrals and deferrals by the United Nations Security Council.

The OTP’s preliminary examinations will be addressed briefly to determine whether intervention in those non-African countries is appropriate. Considering its broader geographical scope of open preliminary examinations, for this very young international institution it is still too early to judge substantively its intention and ability to deliver justice beyond Africa.

**Argument**

**Background**

Founded on the principle of complementarity, the Rome Statute recognizes the primary responsibility of national systems and the complementary role of the ICC only where the relevant state is either unwilling or unable to investigate or prosecute international crimes. Despite being hailed as the first permanent international criminal court, there are many misconceptions about the scope of the ICC’s powers and consequently expectations of its ability to take action in any part of the world. In reality, the Court has inherent jurisdictional limitations and capacity constraints that prevent it from acting against all individuals and in all situations where ICC intervention is desirable.

Principally, the ICC lacks universal jurisdiction to make it a truly global institution. While that remains an achievable goal, with a membership of 122

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